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CAREY, RODRIGUEZ, GREENBERG & PAUL, LLP  
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950 PENINSULA CORPORATE CIRCLE  
SUITE 2022  
BOCA RATON, FL 33487

EXAMINER
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BELANI, KISHIN G

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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BEFORE THE  
BOARD OF PATENT APPEALS AND INTERFERENCES

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*Ex parte* BRADFORD AUSTIN FISHER  
and RANDY ALLAN RENDAHL

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Appeal No. 2009-006321  
Application 10/672,777  
Technology Center 2400

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DECISION ON PETITION

This is a decision on the “Petition Under 37 C.F.R. § 41.3”, filed December 21, 2010 (“Petition”). The Petition requests that:

- 1) “that the Board’s rejection of claims 1 and 11 be designated a new grounds of rejection pursuant to 37 C.F.R. § 41.50(b)”, and
- 2) “that a Decision be issued in which ‘the decision of the examiner[is] reversed in whole or in part on the grounds and on the claims specified by the examiner’ pursuant to 37 C.F.R. § 41.50(a)(1)”.

FINDINGS

- 1) On April 1, 2009 a Docketing Notice, giving the application an Appeal Number of 2009-006321 was mailed to appellants.
- 2) On September 22, 2010 the Board mailed a decision to Appellants, which affirmed all the rejections on appeal.

- 3) On November 22, 2010, appellants filed a Request for Rehearing. In their Request, Appellants argued:

1) “the Honorable Board either misapprehended and/or overlooked certain arguments presented by Appellants in the Appeal Brief of February 22, 2008 and in the Reply Brief of June 17, 2008” (Request for Rehearing p1) and;

b) Moreover in analyzing the current Decision, Appellants cannot rely upon the Honorable Board maintaining the same positions in a subsequent Decision as the Honorable Board presented in the current Decision because of these error. Thus although Appellants will point out certain errors in the Honorable Boards current analysis, Appellants recognize that any subsequent Decision by the Board will necessarily be different and Appellants should be given the opportunity to address the Honorable Board’s analysis . (Request for Rehearing p.7)

- 4) On December 23, 2010, the Board mailed to Appellants a Decision on Rehearing, which denied Appellants’ Request for Rehearing, and also denied Appellants’ Request to designate a new ground of Rejection.
- 5) Appellants, on January 6, 2011, filed their “Petition Under 37 CFR §41.3”, requesting that the Chief Administrative Patent Judge designate the new grounds of rejection, and that the decision of the examiner be reversed in whole or in part.

## DISCUSSION

Appellants, in their petition, state that:

The issue of whether or not a decision by the Board constitutes a new grounds of rejection involves the question as to whether the Board followed the regulations of the Patent Office, and a review of this issue is a proper exercise of authority. *See In Re Oku*, 25 USPQ2d 1155 (Comm'r Pat. 1992)" (Petition p3)

The Commissioner (now Director) in *Oku* did not grant *Oku*'s request for a designation of a new grounds of direction. Instead, the Commissioner granted a request to reopen under 37 CFR §1.198, and denied the rest of the Petition (*In Re Oku*, 25 USPQ2d 1155, 1157 (Comm'r Pat. 1992)). It is also noted that *In re Weiss* 160 USPQ 423 (Comm'r Pat. 1967), held:

The Board in its decision of February 8, 1967 held that it had not employed a new ground of rejection and pointed out its reasons for so holding. A careful review of the case fails to disclose any such clear error in the Board's action in that respect as would justify supervisory intervention. The Board's interpretation of the claims would appear to be a matter reviewable on appeal to the Courts rather than upon petition. *In re Weiss* 160 USPQ 423, 424 (Comm'r Pat. 1967).

The panel, in this appeal pointed out its reason for not holding the rejection of claims 1 and 11 as a new ground of rejection. Accordingly, this portion of the petition must be denied.

In addition, it is noted that Appellants also are requesting a new decision (Petition p 28). The Commissioner (now Director) in *Oku* states:

"The Commissioner does not review the merits of final decision of the Board. *Cf. in re Dickerson*, 299 F.2d 954, 958, 133 USPQ 39, 43 (CCPA 1962) ("[I]n performing his duties, the Commissioner cannot usurp the functions or impinge upon the jurisdiction of the Board...".

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Thus Appellants' request for "a Decision in which "the decision of the examiner [is] reversed in whole or in part on the ground and on the claims specified by the examiner is denied.

Appellants' time to file an appeal to the Courts continues to run two months from the date of the Decision on Request for Rehearing.

#### DECISION

In view of the foregoing, the Petition is DENIED.



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James T. Moore  
Acting Chief Administrative Patent Judge

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